No. 95-124

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Supreme Court of the United States

OCTOBER TERM, 1995

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC. AND AMERICAN CIVIL LIBERTIES UNION,

Petitioners,

—v.—

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONERS

STEVEN R. SHAPIRO
MARJORIE HEINS
American Civil Liberties Union Foundation
132 West 43d Street
New York, New York 10036
(212) 944-9800

CHARLES S. SIMS
Counsel of Record
PETER J. W. SHERWIN
Proskauer Rose Goetz & Mendelsohn LLP
1585 Broadway
New York, New York 10036
(212) 969-3000

Counsel for Petitioners

68 pp

QUESTIONS PRESENTED

Sections 10(a) and 10(b) of the 1992 Cable Act establish a comprehensive scheme for censorship of "indecent" programming on leased access channels. Congress authorized cable operators to prohibit programming that they "reasonably believe" to be indecent and, in the alternative, required such protected speech to be placed on segregated channels that must be blocked until the subscriber requests access in writing and for up to thirty days thereafter. Section 10(c) authorized cable operators to prohibit programming on public, educational, and governmental access channels that is "sexually explicit" or "solicits or promotes unlawful conduct."

1. Is section 10's explicitly content- and speaker-based censorship scheme subject to First Amendment scrutiny?

2. Is section 10 unconstitutional because it authorizes and requires censorship under vague standards and lacks essential procedural safeguards?

3. Is section 10's content- and speaker-based censorship scheme — which regulates "indecent" speech on only access channels and is not the least restrictive means of accomplishing a compelling governmental interest — unconstitutional under the First Amendment?

LIST OF PARTIES

The judgment here reviewed was rendered in a proceeding in the United States Court of Appeals for the District of Columbia Circuit addressing four petitions for review of orders of the Federal Communications Commission.

In addition to those listed on the cover, respondents include Alliance for Community Media, Alliance for Communications Democracy, People For the American Way, New York Citizens Committee for Responsible Media, Media Access New York, Brooklyn Producers' Group, and David Channon. The foregoing respondents are petitioners in no. 95-227, which has been consolidated with the present action, and their interests are aligned with those of petitioners here.

Respondents also include National Cable Television Association, Inc., which was an intervenor in all four proceedings before the court of appeals.

RULE 29.6 NOTATION

Petitioners have no parent companies or subsidiaries.

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No. 95-124

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DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC. AND AMERICAN CIVIL LIBERTIES UNION,

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Respondents.

BRIEF FOR PETITIONERS

OPINIONS BELOW

The en banc opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 56 F.3d 105 and reprinted in the appendix to the petition for writ of certiorari ("Pet. __a") at 2a. The en banc *per curiam* order vacating the panel decision is reported at 15 F.3d 186 and reprinted at Pet. 89a. The panel decision is reported at 10 F.3d 812 and reprinted at Pet. 90a.

JURISDICTION

The court of appeals issued its decision on June 6, 1995 and stayed issuance of the mandate on July 10, 1995. Pet. 1a. The Court docketed the timely petition for writ of certiorari on July 21, 1995 and granted the petition on November 13, 1995. The Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 2350(a).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The First Amendment to the Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom

of speech, or of the press." The Fifth Amendment to the Constitution to the United States provides, in pertinent part, that "No person shall . . . be deprived of life, liberty, or property, without due process of law."

Section 10 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 10, 106 Stat. 1460, 1486 (codified at 47 U.S.C. §§ 531, 532(h), 532(j), and 558) ("section 10" or "§ 10") is reproduced at Pet. 126a. *See also* Statutory Addendum below ("Stat. __a") (relevant provisions governing leased access and PEG access channels).

The implementing regulations of the Federal Communications Commission (the "Commission") are the First Report and Order in the Matter of Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992, 8 FCC Rcd 998 (1993) (codified at 47 C.F.R. § 76.701) ("First Report"), reproduced at Pet. 128a, and the Second Report and Order in the Matter of Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992, 8 FCC Rcd 2638 (1993) (codified at 47 C.F.R. § 76.702) ("Second Report"), reproduced at Pet. 178a.

STATEMENT OF THE CASE

1. **Local Regulation and the 1984 Cable Act.** Cable access channels were first created in the 1960s, as cable operators received franchises from local authorities. Local governments provided "use of public rights-of-way and easements" essential to the cable system's "physical infrastructure," *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2452 (1994), and, in turn, generally required cable operators to act as conduits and set aside some portion of their channel capacity for the public, thereby providing a "direct right of access to the video media" through access channels, the content of which cable operators were generally prohibited from controlling, DANIEL L. BRENNER ET AL., CABLE TELEVISION AND OTHER NONBROADCAST VIDEO § 6.04[1], at 6-31 (1995); *cf. Turner*, 114 S. Ct. at 2465 (cable operators are also conduits for broadcast signals).

In 1972, the Commission promulgated mandatory access rules, requiring the largest cable operators to offer, by 1977, access to the

public on a first-come, nondiscriminatory basis, with operators having no control over content. 36 F.C.C.2d 143 (1972). In 1976, the Commission revised and reissued its mandatory access rules, applying them to more cable systems and extending the compliance date for most systems to 1986. 59 F.C.C.2d 294 (1976). On review of these rules, this Court held them statutorily unauthorized. *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).[1]

Although the Commission lacked authority to mandate cable access channels, local franchising authorities were free to do so, and, in the wake of *Midwest Video*, almost all franchise agreements continued to provide for access by community groups over public access channels, where operators functioned simply as conduits, and prohibited operator control of content. *See* H.R. REP. NO. 934, 98th Cong., 2d Sess. 30 (1984).

Then, in 1984, to "assure that cable communications provide . . . the widest possible diversity of information sources and services to the public," Congress passed the Cable Communication

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[1] Despite their general prohibition of editorial control by cable operators over access channels, the Commission's 1972 access rules required cable operators to "establish" rules prohibiting transmission of obscene or indecent matter, but delayed their compliance date until 1977. 47 C.F.R. § 76.256(d)(1)-(3). In 1976, the Commission revised these provisions to clarify that they were mandatory, but again delayed compliance. 59 F.C.C.2d 984, 986 (1976). These provisions as revised were challenged as an unconstitutional imposition of censorship obligations on cable operators, and the Court of Appeals for the District of Columbia Circuit stayed their effect. *American Civil Liberties Union v. FCC*, No. 76-1695 (D.C. Cir. Aug. 26, 1977) (referenced in *Midwest Video*, 571 F.2d 1025, 1034 n.19 (8th Cir. 1978)). In its *Midwest Video* decision, the Eighth Circuit found that "the Commission appears to have created a corps of involuntary government surrogates, but without providing the procedural safeguards respecting 'prior restraint' required of the government," and flagged several other constitutional concerns. 571 F.2d at 1056, 1057. This Court noted the District of Columbia Circuit's stay and the Eighth Circuit's disapproval of the indecency provisions, but, finding the entire regulatory scheme unauthorized by Congress, did not itself reach those issues. 440 U.S. at 693 n.4, 695-96.

Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2780. 47 U.S.C. § 521. This Act required cable operators to set aside channels for leased access programming that the operators were forbidden to censor. *Id.* § 532(b), (c)(2). It also prohibited them from censoring programming on the public, educational, and governmental ("PEG") access channels required under cable franchise agreements. *Id.* § 531(e). Because cable operators were barred from exercising editorial control over these access channels, Congress explicitly shielded cable operators from liability for access programming. *Id.* § 558.[2] In another provision of the Act, Congress required operators to provide "lockboxes" that enable a subscriber to block any cable channel during selected periods, *id.* § 544(d)(2)[3]; this provision remains in effect.

2. **The 1992 Cable Act**. In 1992, Congress again focused on the cable industry — this time primarily to promote diversity through temporary rate re-regulation, address customer service practices, and implement "must-carry" broadcast rules — and enacted the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460. On the last legislative day before the Senate approved its bill, Senator Helms offered two floor amendments and then-Senator Fowler offered a third that collectively became § 10, entitled "Children's Protection from Indecent Programming on Leased Access Channels." Senator Helms plainly stated the purpose of § 10's liability provision: to "put an end to the kind of things going on" on access channels. 138 CONG. REC. S652 (daily ed. Jan. 30, 1992). No other provision in the lengthy Senate or House bills even remotely treated "indecency" or protection of children. Section 10 was never sent to a committee and was never the subject of any congressional hearings or findings.

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[2] Such immunity would be required in any event where transmitters of speech lack power to control its content. *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525 (1959).

[3] *See* Lockbox Materials, JA 95-100, 126-30, 147-51 (demonstrating the supervising subscriber's ease of voluntarily blocking any cable channel).

Section 10 established a censorship scheme with four interlocking parts. Section 10(a) authorized cable operators to ban from leased access channels what they "reasonably believe[] describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." Pet. 126a. Cable operators were given, and have, no other "editorial discretion" to regulate the content of leased access programming. Pet. 126a; Stat. 2a-4a.

Section 10(b), the stated purpose of which is "to limit the access of children to indecent programming," required the Commission to prescribe rules requiring cable operators that have not "voluntarily prohibited" programming under § 10(a) to segregate all "indecent" leased access programming on channels that must remain blocked until a subscriber requests access in writing; Congress mandated no time period within which such requests must be satisfied. Pet. 126a-27a. Section 10(b) also required the Commission to prescribe rules requiring leased access programmers to identify for cable operators any of their programs that "would be indecent as defined by Commission regulations." Pet. 126a.

Section 10(c) applied to PEG access channels and authorized cable operators to ban "any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." Pet. 127a. However, if a cable operator does not ban particular "indecent" PEG programming, it may cablecast that programming without blocking, just as it may cablecast "indecent" programming on its commercial channels without blocking (where it functions as publisher rather than simply as conduit) and must cablecast such broadcast programming without blocking. *See* Pet. 127a.

Section 10(d) eliminates cable operators' statutory immunity from liability for access programming that "involves obscene material." Pet. 127a. Taken together with § 10's other provisions, § 10(d) virtually compels cable operators to censor "indecency."

3. **Comments to the Rule Making.** On November 10, 1992, the Commission issued a notice of proposed rule making to implement § 10 and requested comments. Petitioners Denver Area Educational Telecommunications Consortium, Inc. ("DAETC"),

which is a nonprofit leased access cable programmer, and American Civil Liberties Union ("ACLU"), whose members include leased and PEG access viewers (also collectively "petitioners"), submitted comments to the Commission challenging the constitutionality of § 10 and describing its impact on a wide variety of access programming of serious journalistic or artistic value.

Petitioners noted their concern with § 10's capacious definition of "indecent programming" as "describ[ing] or depict[ing] sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." Pet. 126a. Because this definition has no substantive content except to subject all programming that contains any mention of human reproduction or sexuality, regardless of its value, to a retrospective assessment of "community standards" of "offensiveness," it encompasses a far wider, but uncertain, range of programming than Senator Helms evidently envisioned from the anecdotal examples he offered on the Senate floor.[4] Comments of DAETC, JA 203-04.[5] Even if one could identify programming that actually contains "indecent" material, § 10(a) exacerbates the overbreadth of that definition by granting cable operators authority to prohibit programs that they "reasonably believe" contain indecent material. Reply Comments of DAETC, JA 330-31; *see* Acton Corp., JA 1-2.

Indeed, much of DAETC's socially useful programming would be swept up in § 10's broad definition of "indecency." DAETC's cable access service, which is known as "The 90's Channel" and is offered in a block of programming reaching approximately 500,000

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[4] Senator Helms referenced programming on leased access that, he alleged, featured people performing oral sex and included ads that "promote incest, beastiality [sic], [and] even rape." 138 CONG. REC. S646 (daily ed. Jan. 30, 1992).

[5] *Accord* Alliance for Community Media, JA 43-45; Boston Community Access and Programming Found., JA 167; Manhattan Neighborhood Network, JA 236; Time Warner Entertainment Co., JA 253-55 (suggesting context and merit elements to the standard); Motion Picture Ass'n of Am., Inc., JA 335-37 (same); *see* Cambridge Community Television, JA 313 (as to § 10(c)).

households, presents in a verité style a wide variety of material. Its programming is often controversial and otherwise unavailable and discusses topics including the Persian Gulf war, environmental contamination, AIDS, racism, US-Cuba relations, art censorship, union organizing, the status of recent immigrants, gay rights, the Palestinian uprising, issues of concern to Native Americans, prostitution, and prison conditions. Comments of DAETC, JA 199-201. An important part of DAETC's programming on many of these topics inextricably deals with sexuality, such as the program segments about an organization that seeks to demystify gynecology and teach women how to perform their own pelvic exams, the controversy surrounding a Robert Mapplethorpe art exhibit, a pro-choice performance artist, and an annual Japanese fertility festival — all of which might well fall within § 10's broad regulatory definition of "indecency" or cable operators' "reasonable beliefs" about "indecency." Program Segments Carried by The 90's Channel Dealing with Sexuality, JA 224-25; *see* Pet. 44a-45a (Wald, J., dissenting).[6]

In their comments to the Commission, cable operators expressed their concern that § 10 offended the First Amendment.[7] Many commented that Congress' existing requirement of lockboxes

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[6] For further examples of the valuable programming at risk, see, *e.g.*, Alliance for Community Media, JA 21-23; Ann Arbor Community Access Television, JA 155; New York Citizens Comm. for Responsible Media, JA 361; Patricia Aufderheide, *Public Access Cable Programming, Controversial Speech, and Free Expression* (Dec. 1992), JA 64, 67; *see also* Schwartz Decl., JA 388-94.

Other access programmers were concerned that the certification and pre-screening requirements placed insurmountable burdens on them because of their limited finances and personnel, resulting in a substantial diminution of invaluable programming. *E.g.*, Ann Arbor Community Access Television, JA 155; Roxie Lee Cole, JA 170-71; Columbus Community Cable Access, JA 172.

[7] Blade Communications, Inc., JA 159; Community Antenna Television Ass'n, JA 175; Cox Cable Communications, JA 196, 197; InterMedia Partners, JA 226; Tele-Communications Inc., JA 247; Viacom Int'l Inc., JA 353-54; *see also* Motion Picture Ass'n of Am., Inc., JA 333-35.

already satisfies the government's asserted interest in protecting children from "indecency," particularly in light of cable's status as an invitee in the home for which the subscriber voluntarily pays a monthly fee.[8] Some commented that, although the bans authorized by §§ 10(a) and 10(c) are in form voluntary, the impact of § 10 in many instances is likely to be a *de facto* ban on the targeted, yet protected, speech.[9]

Local cable authorities complained that the proposed rules would deprive them of their state-law rights to prohibit cable operators from controlling the content of cable access programming, which many of them had exercised even before the Commission attempted to mandate access channels in the 1970s. City of St. Paul, JA 318-26; National Ass'n of Telecommunications Officers & Advisors, JA 345; *see* Continental Cablevision, Inc., JA 181, 186-87 (requesting clarification that agreements prohibiting operator control of access channels are preempted).

4. **The Commission's Reports and Orders.** On February 3, 1993, the Commission released its First Report, which adopted regulations to implement §§ 10(a) and 10(b) relating to leased access channels. Pet. 128a. Despite petitioners' and other comments, the Commission defined "indecent" programming almost identically to the language used in § 10(a), authorized a cable operator to adopt and enforce a policy of banning leased access programming that it "reasonably believes" contains indecency, and, if a cable operator does not voluntarily adopt and enforce such a

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[8] Blade Communications, Inc., JA 160; Community Antenna Television Ass'n, JA 178; Tele-Communications Inc., JA 246, 247; Time Warner Entertainment Co., JA 256; Viacom Int'l Inc., JA 354; *see* Alliance for Community Media, JA 38-39; Boston Community Access & Programming Found., JA 166; Motion Picture Ass'n of Am., JA 334; 'Ōlelo: The Corp. for Community Television, JA 352; New York Citizens Comm. for Responsible Media, JA 364.

[9] Continental Cablevision, Inc., JA 181-82, 183, 187-92; InterMedia Partners, JA 228; *see also* Cambridge Community Television, JA 313; 'Ōlelo: The Corp. for Community Television, JA 351; NYNEX Tel. Cos., JA 377.

policy, required it to block all leased access programming that falls within the Commission's definition of "indecency." 47 C.F.R. § 76.701, Pet. 171a-72a. Cable operators are also allowed to delay for up to thirty days satisfying a subscriber's written request to receive blocked programming. *Id.* § 76.701(c), Pet. 171a.

The First Report's regulations further required leased access programmers to identify whether any of their programming is indecent and to certify at the operator's request whether any or all of their programming is indecent or obscene. If a programmer fails to provide this identification or certification in a timely fashion, the cable operator may cut off access to that programmer altogether. *Id.* § 76.701(f), Pet. 172a. If a cable operator (or a subscriber) disagrees with a programmer's certification, the Commission "will entertain special relief petitions." Pet. 167a-68a.[10] In order to exercise the censorship power delegated to them, cable operators are further authorized to "pre-screen" all leased access programming. Pet. 151a n.39.

The Commission's Second Report adopted regulations to implement § 10(c) relating to PEG access channels. Pet. 178a. The Commission interpreted § 10(c) to authorize cable operators to prohibit obscene material, indecent material (defined as in the First Report, rather than as § 10(c)'s "sexually explicit material"), and material soliciting or promoting unlawful conduct (interpreted by the Commission as "material that is otherwise proscribed by law"). 47 C.F.R. § 76.702, Pet. 197a-98a. To further facilitate censorship of access programming, the regulations provided that a cable operator may require a PEG access programmer "to certify that its programming does not contain any of the materials" subject to § 10(c) prohibition. *Id.*, Pet. 198a. Additionally, the Commission stated that it would not consider disputes from subscribers or PEG programmers complaining of undue censorship. Pet. 194a.[11]

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[10] Under § 10(a), the Commission does not, apparently, intend to hear programmers' or viewers' complaints of undue censorship. Pet. 166a-68a; *see* Time Warner Entertainment Co., JA 380.

[11] The Commission also read a "reasonably believes" standard into

(continued...)

The Commission also determined in each of the reports and orders that § 10 and its implementing regulations preempt contrary state or local law and contrary provisions in cable franchise agreements. Pet. 157 n.44, 183a n.7.

5. **The Proceedings Below.** Petitioners petitioned the Court of Appeals for the District of Columbia Circuit for review pursuant to 28 U.S.C. § 2342(1). These petitions were consolidated with others, and the Commission and the United States (collectively the Commission or the "government") were respondents in each.

After oral argument during which the government conceded that, if §§ 10(a) and 10(c) involved "state action," they would violate the First Amendment, Pet. 104a n.9, a panel of the court unanimously struck down §§ 10(a) and 10(c). As to § 10(b) and its implementing regulations, the panel found such serious constitutional questions due to their apparent underinclusiveness that it remanded them to the Commission for reconsideration. Pet. 112a-25a.

The full court vacated the panel's judgment, reheard the case en banc, and sustained § 10 and the regulations over the dissent in whole or in part of four of the court's eleven judges. Pet. 4a-5a.[12] The majority concluded — in an unprecedented holding — that the court could avoid reaching petitioners' constitutional challenges to a content-based statute regulating protected speech and the implementing regulations because they only authorize, rather than command, private parties to ban the targeted speech and because those private acts cannot be attributed to the government. Pet. 11a-27a. As to § 10(b), which compels blocking in the absence of banning on leased access channels, the majority held, despite the absence of legislative or administrative support, that it is the least restrictive means to serve the "compelling" interest in shielding minors from "indecent" speech, Pet. 32a-36a, and cursorily determined that § 10 is not impermissibly vague, Pet. 42a-43a.

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[11](...continued)
§ 10(c). Pet. 189a.

[12] Former-Chief Judge Mikva sat on the original panel, but retired before the rehearing en banc.

In her dissenting opinion joined in full by Judge Tatel, Judge Wald pointed out that §§ 10(a) and 10(b) must be considered together as part of one scheme regulating leased access programming, which, rather than "restore" editorial control to cable operators, requires them either to ban or block "indecent programming" and, as such, is clearly subject to First Amendment scrutiny. Pet. 46a-53a. Now also joined by Judge Rogers, Judge Wald concluded that §§ 10(a) and 10(b) unconstitutionally cause a deprivation of First Amendment rights because of their undue burden on both speakers and listeners, Pet. 54a-58a, and are not the least restrictive means of achieving the asserted compelling interest because of the ready availability of less restrictive means, such as the existing lockbox requirement, Pet. 66a-71a. Additionally, Judge Wald found that § 10(c), with its governmentally imposed definitions of disfavored speech and its erection of a separate statutory scheme to regulate such speech, clearly constitutes governmental action and is not the least restrictive means of achieving the asserted compelling interest. Pet. 71a-75a.

Chief Judge Edwards dissented in part and found that §§ 10(a) and 10(b), which must be read together, involve government action (while § 10(c) does not) and that they work in tandem to produce an impermissible ban on protected speech. Pet. 77a-81a. Chief Judge Edwards also questioned whether the government's asserted interest in shielding minors from "indecency" was compelling. Pet. 82a-84a. Judge Rogers, concurring in part and dissenting in part, agreed that § 10(b) is unconstitutional, but argued that it is severable from §§ 10(a) and 10(c). Pet. 85a-88a.

SUMMARY OF THE ARGUMENT

Section 10 and its implementing regulations cannot escape constitutional scrutiny because laws regulating speech and discriminating on the basis of content and speaker identity are subject to review regardless of whether every action taken under them is state action. Congress, through 28 U.S.C. §§ 2342-49, directed the courts to "determine the validity" of all Commission regulations, which necessarily requires resolution of constitutional challenges. Moreover, § 10 preempts state laws banning operator censorship of

access channels and establishes the Commission as a joint participant in the censorship scheme. (Point I.)

Section 10 and its implementing regulations are invalid because they authorize operators to ban disfavored speech under impermissibly vague standards and without the procedural safeguards required of all laws that authorize the prohibition of speech based on its content. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), is not to the contrary, because, in an adjudicative (rather than facial) challenge, it narrowly addressed the permissibility of an "indecent language" standard and did so only in the context of channeling. Here, however, private delegates are ordered to segregate and block a completely vague category of "patently offensive" "programming" (not merely "language") if they do not prohibit it outright on a "reasonable belief" that it is "indecent," all without administrative or judicial superintendence. (Point II.)

Finally, § 10 is invalid because it imposes new censorship and other substantial burdens on protected speech due to its content and the identity of its speakers. Moreover, assuming further scrutiny is necessary, § 10's application to far more speech than might be harmful to minors, the underinclusiveness of the blocking requirement (cable operators are free to continue cablecasting identical speech on PEG and commercial channels without blocking), and the availability of less restrictive but equally effective alternatives (such as lockboxes and blocking on request) doom the censorship system that § 10 created for access channels. (Point III.)

ARGUMENT

Cable programmers "engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment" when they create and disseminate "'original programming . . . on a wide variety of topics and in a wide variety of formats.'" *Turner*, 114 S. Ct. at 2456 (citation omitted).

Their speech is no less protected when it touches on sex. As this Court held in *Roth v. United States*, 354 U.S. 476, 487 (1957), "[t]he portrayal of sex, *e.g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and

mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern."[13]

Given § 10's extraordinarily sweeping definition of "indecency" and authorization to censor speech upon a "reasonable belief" that that broad definition is met (*see* Point II below), this case must be decided in full recognition that § 10 imperils the presentation of speech of substantial artistic, literary, scientific, medical, educational, and social importance: speech that is protected not only for adults, but for teenagers as well.[14] The measure of the threatened speech is the capacious, subjective language of § 10 and the unsuperintended discretion it affords, not the anecdotal allegations with which sponsors regaled Congress during the brief hours that § 10 was considered. *Cf. Estate of Cowart v. Nicklos Drilling*, 505 U.S. 469, 475 (1992); *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 97-98 (1991).

I.

ALL OF SECTION 10 IS IMPERMISSIBLY CONTENT-BASED, AND NO PART CAN BE IMMUNIZED FROM CONSTITUTIONAL REVIEW BY THE STATE ACTION DOCTRINE.

Recognizing (indeed conceding at oral argument below, Pet. 104a n.9) that §§ 10(a) and 10(c) could not pass muster under the First Amendment, the government attempts to avoid constitutional scrutiny altogether. Remarkably, the en banc majority decided that it need "not reach petitioners' First Amendment attack on sections 10(a) and 10(c)," because "a private cable operator may refuse to carry indecent programming without having its decision tested by First Amendment principles applicable to the government

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[13] *See also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 (1983).

[14] *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-14 (1975) ("minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them") (citation omitted); *Bolger*, 463 U.S. at 74 n.30.

alone." Pet. 31a; *see* Pet. 11a-12a. However, because a cable operator may censor only under the authority and to the limited extent Congress devised in §§ 10(a) and 10(c), the court's holding is indefensible, and its reasoning is a non sequitur.

All statutes are subject to constitutional constraint and, therefore, necessarily to constitutional review. Properly analyzed, this case presents no state action issue at all, and § 10 is subject, in its entirety, to strict scrutiny.

A. The Court Must Determine the Validity of Section 10.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press." Section 10 is plainly such a law and, thus, is subject to "the most exacting scrutiny," according to a long line of cases concerning "regulations that *suppress, disadvantage, or impose differential burdens* upon speech because of its content," *Turner*, 114 S. Ct. at 2459 (emphasis added), as well as cases concerning laws that directly burden expression.[15]

Before § 10's enactment, federal law and many state and local laws and agreements prohibited cable operators from interfering in *any* manner with programming on access channels, regardless of content,[16] because access channels' very *raison d'être* is to establish a forum in which persons other than large media companies can speak to the public in one of the Nation's most important mediums of communication. Now, however,

- section 10(a) authorizes and encourages[17] cable operators to ban

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[15] *E.g.*, *Texas v. Johnson*, 491 U.S. 397, 406-07 (1989); *Meyer v. Grant*, 486 U.S. 414, 420 (1988); *see Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 591-92 (1983) (law singling out small category of speakers for special treatment poses particular First Amendment dangers).

[16] *E.g.*, 47 U.S.C. §§ 531-32; N.Y. Exec. L. § 829; *see* JA 186 & n.7.

[17] Indeed, the purpose and effect of § 10 is actually to coerce cable operators to censor, because the alternative to § 10(a) censorship is the (continued...)

speech depending on its content — *i.e.*, programming that the operator "reasonably believes" to be "indecent" (a term Congress and the Commission defined) — and only if such programming is offered by a leased access cable programmer;

- section 10(c) authorizes and encourages cable operators to ban speech depending on its content — *i.e.*, programming that is "sexually explicit" or "solicits or promotes unlawful conduct" — and only if such programming is offered by a PEG access cable programmer;
- sections 10(a) and 10(b) require cable operators either to promulgate and enforce written policies banning speech believed to be indecent on leased access channels or to block such programming pursuant to Commission regulations;
- sections 10(a) and 10(c) authorize cable operators to pre-screen access programming for the sole purpose of ferreting out material that either they believe to be "indecent" or that "promotes" unlawful conduct;[18] and
- sections 10(a), 10(b), and 10(c) preempt all state and local laws, and all franchise or other agreements entered into pursuant to those laws, that prohibit cable operators from pre-screening, banning, blocking, or otherwise interfering with speech on access channels.[19]

Given those provisions, the content- and speaker-based lines they embody, and the stated purposes of the bill's sponsors, §§ 10(a) and 10(c) are core candidates for the exacting First Amendment review required by *Turner* and the cases cited above at 14 n.15.

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[17](...continued)
burdensome § 10(b) segregation and blocking scheme, and because § 10(d) threatens the operator with criminal liability for access programming with sexual content. *See* above at 5; *see also* Alliance for Community Media, JA 13-14, InterMedia Partners, JA 228-29.

[18] First Report, Pet. 151a n.39; *see* Second Report, Pet. 189a.

[19] First Report, Pet. 157 n.44; Second Report, Pet. 183a n.7.

The court of appeals' contrary conclusion was premised on the fact that the actor directly undertaking the newly authorized censorship decisions would be a private party, thereby rendering successful Senator Helms' attempt to craft anti-"indecency" legislation that would escape First Amendment scrutiny.[20] But it has long been the rule, both in cases challenging Commission action, *see Columbia Broadcasting Sys., Inc. v. United States*, 316 U.S. 407, 415-17 (1942), and elsewhere, that courts consider the harm that laws and rules are likely to cause, regardless of who "directly" causes the harm.

"[I]n passing upon constitutional questions the court has regard to substance and not to mere matters of form, and . . . the statute must be tested by its operation and effect." *Near v. Minnesota*, 283 U.S. 697, 708 (1931); *accord Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 255 (1986) (plurality opinion) ("The fact that the statute's practical effect may be to discourage protected speech is sufficient to characterize [it] as an infringement on First Amendment activities").[21]

Nothing in *Turner* or in any other case delineating the kinds of laws subject to exacting scrutiny suggests that a properly presented constitutional challenge can be not reached simply because the

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[20] "[T]here is no constitutional problem with this amendment because this is not governmental action. It is an action taken by a private party." 138 CONG. REC. S646 (daily ed. Jan. 30, 1992) (statement of Senator Helms); *see also id.* at S649 (statement of Senator Fowler) ("[Indecent and other undesired programming] should be stopped, must be stopped, and I think this amendment will empower the cable operators to stop it").

[21] *See also Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118-19 (1991) (considering effect on publishers' ability to pay authors); *Meyer v. Grant*, 486 U.S. at 423 (considering effect on candidates' ability to pay signature gatherers); *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 97-98 (1982) (considering effect on minor parties' ability to operate effectively); *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1014-15 (1995) ("*NTEU*") (considering effect of ban of honoraria on the flow of speech).

harms flowing from statutory implementation flow through private parties.[22]

Cases in other constitutional contexts make the same point and have subjected statutes to scrutiny even where no harm would have occurred unless a third party did something that it was authorized (but not compelled) to do. For example, this Court invalidated a statute authorizing cable operators to invade apartment buildings, even though the statute did not direct any entry whatsoever and merely "adjusted" property rights, leaving cable operators free to enter or not. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Similarly, this Court struck under the Establishment Clause a statute authorizing churches and schools to veto applications for certain liquor licenses, even though churches are not state actors and were free to use the veto or not. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982).[23]

The court of appeals' decision to "not reach" petitioners' First Amendment challenge, Pet. 31a, disregards the very provisions pursuant to which this action is brought. Congress directed the courts of appeals, in 28 U.S.C. §§ 2342, 2344, and 2349, to "determine the validity of . . . all final orders of the Federal Communications Commission," 28 U.S.C. § 2342(1), and "make

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[22] See *Nixon v. Herndon*, 273 U.S. 73 (1927) (statute disqualifying blacks from Democratic primary invalidated) and its progeny from *Nixon v. Condon*, 286 U.S. 73 (1932) to *Terry v. Adams*, 345 U.S. 461 (1953), all of which condemned what was effectively the same discrimination condemned under *Herndon*, only this time accomplished under re-designed statutes attempting to shield the discrimination from judicial review by clothing it as private action. As the Court observed in *Lane v. Wilson*, 307 U.S. 268, 275 (1939), the Constitution "nullifies sophisticated as well as simple-minded" efforts to effect unconstitutional outcomes.

[23] The court of appeals' refusal to reach a First Amendment challenge when harm would flow from the discretionary decisions of third parties is also at war with the line of cases from *NAACP v. Alabama*, 357 U.S. 449 (1958), to *Socialist Workers*, 459 U.S. 87. In each of those cases, *all* the harm complained of flowed from the acts of third parties, but this Court proceeded to the merits.

and enter . . . a judgment determining the validity of . . . the order of the agency," *id.* § 2349(a).

The courts could not "determine the validity" of the Commission's final rules, however, without considering properly presented constitutional challenges. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Indeed, it is axiomatic that in every proper case it is the court's duty "to say what the law is" and to refuse to give effect to a statute or regulation that violates the Constitution. *Id.* at 177. That is why this Court has routinely considered constitutional challenges in cases brought pursuant to 28 U.S.C. § 2342 (or its predecessor), without ever pausing to see "whether state action is present." *See, e.g., Midwest Video*, 440 U.S. 689; *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978); *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973); *National Broadcasting Co. v. United States*, 319 U.S. 190, 226 (1943).

For the court of appeals not to "reach" the challenge to §§ 10(a) and 10(c) — not even to *decide* whether the First Amendment forbids Congress from delegating to private parties the authority that they had theretofore lacked to censor speech depending on its content — violates both § 2342 and the obligation to say "what the law is" in a proper case.

The en banc court asserted that § 10 was not subject to review under the First Amendment because "it simply *adjusted* editorial authority between two private groups." Pet. 15a (emphasis added). So characterizing § 10 does not support an abdication of judicial review. Just the contrary, a legislative "adjustment" of who will have the right to speak would seem to provide a core occasion for review. *See PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) (rejecting on the merits a claim that state's adjustment of right to speak on private property violated the Fifth and Fourteenth Amendments); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (upholding on the merits a challenge to state adjustment of right to speak in print publication); *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94 (rejecting on the merits a claim that the First Amendment required change in the existing distribution of speech rights on public airwaves).

This Court has insisted that "where legislative abridgment of [First Amendment] rights is asserted, the courts should be astute to examine the effect of the challenged legislation" and decide its constitutionality in "*every* case." *Schneider v. State*, 308 U.S. 147, 161 (1939) (emphasis added). The court of appeals disobeyed that mandate here when it chose to "not reach" petitioners' First Amendment attack on sections 10(a) and 10(c). Pet. 31a.

B. The Issue Is Whether Section 10 Violates the Constitution, Not Whether Particular Censorship Decisions of Cable Operators Would Be State Action.

1. The state action doctrine is inapposite.

Petitioners' challenge to the constitutionality of § 10 poses no state action question, and none need be resolved. The state action doctrine arises when a private party's actions are claimed to be subject to constitutional constraint, an issue this case does not raise.[24] It has no relevance to any question of whether particular statutes are somehow insulated from constitutional review.

Neither the court of appeals' lengthy discussion, nor any brief that the Commission submitted, cites *any* case refusing to reach a properly presented constitutional challenge to a statute or regulation upon a determination that actions taken pursuant thereto would not be "state action." Petitioners have not found a single case holding that a constitutional challenge to a statute need not be reached on state action grounds.[25]

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[24] *See* RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 16.1, at 524 (2d ed. 1992) ("All of the cases involving a state action issue have an essentially similar fact pattern. In these cases one individual citizen (the 'aggrieved party') feels that his freedoms or rights have been violated by the actions of another (the 'alleged wrongdoer')"); *see also, e.g., Edmondson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

[25] Neither apparently has Professor Tribe, who notes that, "[i]f litigants challenge a federal or state *statute* . . . in a case where the validity of the

(continued...)

The court seemed to believe *Reitman v. Mulkey*, 387 U.S. 369 (1967), supported its decision, Pet. 16a-17a, but it does just the opposite. *Reitman*'s relevant teaching is not so much the 5-4 decision on the merits, but the Court's *unanimous* decision to reach the constitutionality of the state constitutional amendment repealing fair housing statutes and making future ones more difficult to enact. Although on the merits the four dissenting justices disagreed sharply, they found "*no question* that the adoption of § 26 . . . constituted 'state action' within the meaning of the Fourteenth Amendment. The *only* issue is whether this provision impermissibly deprives any person of equal protection of the laws." 387 U.S. at 392 (Harlan, J., dissenting) (emphasis added).[26]

To the same effect is *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987), another decision on which the government inexplicably relied. The relevant portion of that case is the disposition *on the merits* of the facial challenge to a statute as violative of free speech rights, even though no speech would have even been arguably impaired unless a private party took the action that the statute authorized but did not compel. Because the constitutionality of a federal statute was challenged, the Court was obliged to reach and decide the merits of the First Amendment attack, and every member of the Court did.[27]

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[25](...continued)
statute is necessarily implicated, state action is obvious, and no formal inquiry into the matter is needed." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 18-1, at 1688 (2d ed. 1988); *see also* ROTUNDA & NOWAK, § 16.1, at 524 ("When a legislature, executive officer, or a court takes some official action . . . , that action is subjected to review under the Constitution, for the official act of any governmental agency is direct governmental action and therefore subject to the restraints of the Constitution").

[26] Post-*Reitman* cases involving repeals of anti-discrimination measures reached and decided the merits as well. *See, e.g., Crawford v. Board of Educ.*, 458 U.S. 527 (1982); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982).

[27] This Court only had occasion to discuss state action when it moved to (continued...)

This Court has insisted on "careful attention to the gravamen of the plaintiff's complaint" in considering state action issues. *Blum v. Yaretsky*, 457 U.S. 991, 1003 (1982). Here, the petitions for review challenged the validity of § 10 and its implementing regulations under § 2342 and did not raise the question whether "the operators' exercise of . . . discretion [is] state action subject to the First Amendment," Pet. 15a (as posed by the en banc court).

2. Section 10 does not "restore" rights to cable operators, and a partial restoration is constitutionally reviewable in any event.

The court of appeals' decision to "not reach" petitioners' challenge to §§ 10(a) and 10(c) rested largely on its assumption that Congress had merely "restored" to cable operators some "editorial control" that they supposedly had over access channels prior to the 1984 Act. Pet. 13a-17a. That assumption is factually wrong and would not, in any event, justify letting § 10 escape judicial review.

Access channels are creatures of state or federal law or local franchise agreement, for which cable operators function simply as conduits and over which they never had editorial control. Even prior to 1984, state law (the source of property rights) and franchise agreements generally required access channels and prohibited cable operator censorship thereof, even before any given system was even constructed. *See* above at 2, 3. The Commission's early regulations carving out an exception to this no-censorship rule for "obscene or indecent" programming were a *mandate*, not a grant of editorial discretion, and never even went into effect, having been recognized as flatly unconstitutional. *See* above at 3 n.1. Judge Randolph was therefore mistaken when he relied on a supposed pre-1984 state-of-nature where operators had editorial control over alleged indecency on cable access. Pet. 14a. Moreover, as to

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[27](...continued)
the distinct question of whether post-enactment enforcement decisions made by an ostensibly private party as to which of various possible infringers to sue (discretionary decisions that Congress did not constrain or selectively authorize) violated the Fifth Amendment. 483 U.S. at 542.

leased access, § 10 cannot fairly be characterized as restoring "editorial control"; rather, it permits only a highly constrained choice between two speech-limiting alternatives. Pet. 47a (Wald, J., dissenting).

But even assuming *arguendo* that Congress could grant cable operators full editorial control over locally created PEG access channels and over leased access channels without violating the First Amendment, it may not partially and selectively grant editorial control in a way that suppresses, disadvantages, or imposes differential burdens on speech because of its content. *Turner*, 114 S. Ct. at 2459. "[E]ven a traffic regulation cannot discriminate on the basis of content . . . ." *Erznoznik*, 422 U.S. at 215; *e.g.*, *Simon & Schuster*, 502 U.S. at 116 ("the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace"); *Leathers v. Medlock*, 499 U.S. 439, 448-49 (1991).

If the constitutional rule were otherwise, no court could consider and decide a First Amendment challenge to a statute selectively "restoring" the rights of cable operators to censor on access channels the speech of African-Americans or socialists or speech opposing reduction of welfare grants. Actions taken under the authorization of such a statute would be merely "restoration," not state action, and the statute itself would (under the court's reasoning) be "immunized" from constitutional challenge.[28] But such statutes are, of course, facially unconstitutional and subject to judicial review in a proper challenge, regardless of whether the cable operator's censorship as authorized by statute would itself violate the Constitution.[29]

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[28] Other examples make the same point: for instance, a law selectively "restoring" to telephone companies (otherwise obligated to provide universal service) the power to deny service to any customer who believes in Christianity or who publicly supports telecommunications reform.

[29] *Cf. DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 197 n.3 (1989) (although a state may fail to protect its citizens generally without running afoul of the due process clause, it "may not, of

(continued...)

In short, as Judge Wald observed (Pet. 50a n.4), the court of appeals erred in supposing that whether a law is subject to review under the Constitution, and whether all action taken under its cloak is state action, are the same question.

3. Section 10 cannot escape constitutional scrutiny, because it preempts contrary state law, significantly encourages content-based censorship, and embroils the Commission as a joint participant in the censorship scheme.

Additional factors confirm beyond doubt that § 10 is subject to constitutional scrutiny. First, § 10 is subject to review (or, in the court of appeals' imprecise formulation, "state action is present") because it preempts contrary state law. *Railway Employes' Dep't v. Hanson*, 351 U.S. 225 (1956).

In *Hanson*, a group of employees, who chose not to join a union in reliance on the Nebraska "right-to-work" law, sued their company and its union over the inclusion of a closed-shop agreement in the labor contract, which they claimed violated their First Amendment rights. Even though the Railway Labor Act had merely authorized, but in no way *required*, the challenged closed-shop agreement, and even though the decision to require one was made by the union and company alone, this Court unanimously agreed that the constitutional question tendered had to be decided. "If private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded." 351 U.S. at 232.[30]

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[29](...continued)
course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause").

[30] The government has asserted that *Hanson* has been essentially overruled, relying upon *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). *Jackson*, however, did not deal with preemption, much less with a facial challenge to a statute that on its face authorized previously forbidden constitutional actions. This Court has subsequently and repeatedly reaffirmed *Hanson*'s rationale. *E.g.*, *Communications Workers*

(continued...)

Section 10 is subject to review under *Hanson*, because it is similarly preempting and subjects programmers to censorship despite otherwise enforceable state law rights (including municipal franchises) to be free from such censorship. Second Report, Pet. 183a n.7.

Second, the reviewability of §§ 10(a) and 10(c) follows *a fortiori* from *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989). *Skinner* subjected to constitutional scrutiny a statute that permitted (but did not compel) private drug testing, noting that "the Government did more than adopt a passive position towards the underlying private conduct." *Id.* at 615; *see also Blum v. Yaretsky*, 457 U.S. at 1004 (government's "significant encouragement" of private conduct creates state action); *Norwood v. Harrison*, 413 U.S. 455, 465 (1973) ("'a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish'") (citation omitted). As in *Skinner*, the government has in § 10 adopted more than a passive position, for it has imposed definitions of disfavored speech and erected a separate statutory scheme to regulate such speech.

Finally, §§ 10(a) and 10(b) establish a comprehensive scheme to censor "indecency" on leased access channels with private cable operators and the Commission playing interlocking roles: the Commission defines indecency, resolves certain disputes over its application, and prescribes blocking and segregation requirements, while the cable operators determine what programming falls within their "reasonable belief" of indecency and decide whether to ban or block such programming pursuant to the choice Congress has imposed. Such a joint enterprise between government and private actors is subject to constitutional scrutiny. *See Skinner*, 489 U.S. at 615; *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970).[31]

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[30](...continued)
of Am. v. Beck, 487 U.S. 735, 761 (1988); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 218 n.12 (1977).

[31] See Pet. 46a-53a (Wald, J., dissenting) for a further explanation of the (continued...)

II.

SECTION 10 IS UNCONSTITUTIONAL BECAUSE IT AUTHORIZES AND REQUIRES CENSORSHIP UNDER VAGUE STANDARDS AND LACKS ESSENTIAL PROCEDURAL SAFEGUARDS.

To ensure the "[p]recision of regulation" that "must be the touchstone" when free expression is concerned, *NAACP v. Button*, 371 U.S. 415, 438 (1963), laws regulating speech must not be vague and must include procedural safeguards to secure the prompt restoration of protected speech when it has been improperly censored. Section 10 fails both requirements.

A. Section 10 Is Completely Vague.

1. Laws that inhibit free speech are subject to the most "stringent" standards of precision. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *Cramp v. Board of Pub. Instruction*, 368 U.S. 278, 287 (1961).[32] Vague laws touching speech invite over-censorship and viewpoint-based enforcement by granting censors "unbridled discretion." *See, e.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123, 132 (1992); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975) (condemning denial of access to a municipal theater where "the exercise of such authority was not bounded by precise and clear standards"); *Smith v. Goguen*, 415 U.S. 566, 574-75 (1974).[33]

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[31](...continued)
joint §§ 10(a) and 10(b) scheme. Even under § 10(c), the Commission is a joint participant in operators' censorship: it defines the disfavored ideas and directs operators that they may require programmer certifications. Petitioners also join in the argument of petitioners in no. 95-227 that censorship of speech in a public forum such as cable access channels is always subject to constitutional scrutiny.

[32] *See Hynes v. Mayor & Council of Oradell*, 425 U.S. 610, 620 (1976) ("general test of vagueness applies with particular force in review of laws dealing with speech").

[33] *Cf. City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, (continued...)

Vague laws also pose an unacceptable risk of self-censorship, because speakers who cannot discern clear lines will "'steer far wider of the unlawful zone' than they would if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)); *see Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (vague laws fail to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly"); *see also Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1051 (1991).

Thus, vague laws attempting to regulate or suppress non-obscene speech have been repeatedly struck down,[34] even when enacted to protect minors.[35] Illustrative is *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968), where this Court invalidated an ordinance requiring film classification and prohibiting attendance by youths under 16 at films classified "not suitable for young persons." Although the "not suitable" standard had been fleshed out — defined as "describing or portraying nudity beyond the custom-

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[33](...continued)
762-69 (1988); *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (vague statutes permit those implementing them "'to pursue their personal predilections'") (citation omitted).

[34] *E.g.*, *Winters v. New York*, 333 U.S. 507 (1948) (statutory standard interpreted by state court to be "criminal news or stories of deeds of bloodshed or lust, so massed as to become vehicles for inciting violent and depraved crimes"); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) ("sacrilegious" as a licensing standard); *Gelling v. Texas*, 343 U.S. 960 (1952) (per curiam) ("prejudicial to the best interests of the people of said City"); *Superior Films, Inc. v. Department of Educ.*, 346 U.S. 587 (1954) (per curiam) ("moral, educational, or amusing and harmless"); *Holmby Prods., Inc. v. Vaughn*, 350 U.S. 870 (1955) (per curiam) ("cruel, obscene, indecent or immoral, or such as tend to debase or corrupt morals").

[35] *E.g.*, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 59 (1963) (condemning a commission that was charged with reviewing material "manifestly tending to the corruption of the youth.").

ary limits of candor in the community, or sexual promiscuity or extra-marital or abnormal sexual relations in such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest," *id.* at 681 — eight members of the Court concluded that, in the end, "'[t]he only limits on the censor's discretion is his understanding of what is included within the term "desirable, acceptable or proper." This is nothing less than a roving commission.'" *Id.* at 688 (citation omitted).[36]

Interstate Circuit rejected the argument that a vague standard was permissible so long as "it was adopted for the salutary purpose of protecting children." *Id.* at 689. "The permissible extent of vagueness is not directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children." *Id.* Rather, it depends on the harm to free expression, regardless of an assertedly narrow interest in protecting children.

> [A] local exhibitor who cannot afford to risk losing the youthful audience . . . may contract to show only the totally inane. The vast wasteland that some have described in reference to another medium might be a verdant paradise in comparison. The First Amendment interests here are, therefore, broader than merely those of the film maker, distributor, and exhibitor, and certainly broader than those of youths under 16.

Id. at 684.

2. Section 10's fulcrum is the phrase "indecent programming," defined as "any programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium." 47 C.F.R. § 76.701(g), Pet. 172a. Programmers must

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[36] Notably, the Dallas ordinance posed far less damage to First Amendment rights than § 10 does, because it did not censor outright all pictures classified as "not suitable," did not make speech unavailable to adults, treated all minors 16 and over as if they were adults, and afforded minors the opportunity to view "unsuitable" films with their parents.

identify "any programming that is indecent"[37] on pain of a damoclean array of sanctions and remedies that include censorship of individual programs, financial penalties, and denial of access to a program provider in the future. *Id.* § 76.701(f), Pet. 172a; *see also* First Report, Pet. 168a. Operators are given wide discretion to require more, including certifications that particular programming (or all programming) is not "indecent" or that "reasonable efforts" will be undertaken to "insure" that indecent live programming will be prevented. *Id.* § 76.701(e), Pet. 172a; *id.* § 76.702, Pet. 197a-98a. Operators may suppress or must block "indecent programming" and may pre-screen in order to do so. *Id.* § 76.701(a), Pet. 171a; *id.* § 76.702, Pet. 197a-98a; First Report, Pet. 151a n.39.

The definition of "indecent" under § 10 is substantially more vague than the familiar three-part test upheld against a vagueness challenge by a 5-4 decision in *Miller v. California*, 413 U.S. 15 (1973), because it utterly dispenses with two parts of that triangulated test. Programmers, operators, and indeed the Commission and courts are deprived of the substantial instruction and constraint that *Miller* affords by restricting obscenity to "hard-core pornography," and then to only those patently offensive works that, "as a whole, appeal to the prurient interest" and, "taken as a whole, do not have serious literary, artistic, political, or scientific value." *Id.* at 24. Unlike the hard-core pornography to which *Miller* restricted itself, a category that Justice Stewart memorably described with the phrase "I know it when I see it," *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (concurring opinion), "indecency" encompasses a broad and undefined category that appears to extend far beyond even "soft-core" pornography and that no member of this Court has ever suggested is recognizable on sight.

Just as there is no telling how a stool with two of its three legs sawed off will land, no one can know what may be proscribed when "indecency" means only what is "patently offensive" by "contemporary community standards": terms that prescribe no ascertainable standard of conduct at all and are, therefore, "perfectly vague." *See, e.g., Smith v. Goguen*, 415 U.S. at 573 (invalidating a law

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[37] 47 C.F.R. § 76.701(d), Pet. 171a.

barring "contemptuous" treatment of the flag, because "'[w]hat is contemptuous to one man may be a work of art to another'") (citation omitted); *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971) (ordinance barring "annoying" conduct is "vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all").[38]

Moreover, § 10 regulates speech exclusively on a basis ("offensiveness") that this Court has repeatedly said is constitutionally impermissible. *See, e.g., Texas v. Johnson*, 491 U.S. at 414 (government "may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); *Cohen v. California*, 403 U.S. 15, 25 (1971) ("the State has no right to cleanse public debate" of certain "offensive" words); *Bolger*, 463 U.S. at 71 ("offensiveness" is not a justification for suppressing expression).

Comments from cable operators show precisely how widely these delegate censors will steer, untethered by any clear and ascertainable standard. *E.g.*, Acton Corp., JA 1-2; Community Antenna Television Ass'n, Inc., JA 175-76; NYNEX Tel. Cos., JA 377, 383-84; *see also Goldstein v. Manhattan Cable Television, Inc.*, No. 90 Civ. 4750, 1995 WL 562182 (S.D.N.Y. Sept. 20, 1995). The wages of imprecision will be the routine suppression of fully

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[38] *See also Southeastern Promotions*, 420 U.S. at 552-53 ("clean and healthful and culturally uplifting" standard gives city "unbridled discretion"); *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 149-51 (1946) (application of a "not morally improper" standard would be sanctioning censorship); *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 573 (9th Cir. 1984) ("family entertainment" standard "does not . . . provide a standard sufficient to limit arbitrary and capricious action"), *cert. denied*, 471 U.S. 1054 (1985); *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1035-40 (D.C. Cir. 1980); *Finley v. NEA*, 795 F. Supp. 1457, 1471-72 (C.D. Cal. 1992) (striking down "general standards of indecency" requirement because "the very nature of our pluralistic society is that there are an infinite number of values and beliefs and, correlatively, there may be no national 'general standards of decency'") (appeal pending).

protected speech — not just "obscenity lite," but speech of substantial value, Pet. 44a-45a & n.1 (Wald, J., dissenting) — and the contraction of what is available to "the totally inane." *Interstate Circuit*, 390 U.S. at 684. The opportunity for cable access channels to offer viewers some relief from the "vast wasteland" on broadcast and most operator-programmed channels — to see the works of artists such as Courbet or Rodin or Picasso (some of which depict sexual organs), or films like *Putney Swope* (with a classic scene at the urinal) or *Carnal Knowledge* (found protected in *Jenkins v. Georgia*, 418 U.S. 153 (1974)), or educational works on breast or testicular self-examination — would be further diminished, or dashed.

Section 10's self-certification requirements magnify the chilling effect, as this Court's prior cases invalidating oaths disclaiming certain kinds of speech attest. *Baggett v. Bullitt*, 377 U.S. at 372 ("uncertain meanings of . . . oaths require the oath-taker . . . to 'steer far wider of the unlawful zone'") (citation omitted); *Cramp v. Board*, 368 U.S. at 286; *see also Bella Lewitzky Dance Found. v. Frohnmayer*, 754 F. Supp. 774, 782-83 (C.D. Cal. 1991).

The consequence of the over-aggressive deployment of the operator's or the Commission's imprecise censorial power, or even a programmer's wrong guess, is not merely channeling certain language to a later hour, as in *Pacifica*, 438 U.S. 726, or even a stay of cablecasting pending prompt judicial review. Rather, the consequence is a final restraint of protected speech for adults as well as children: speech that the programmer has a constitutional right to present and viewers to receive. Such DAETC programs as a cinema verité self-help gynecological exam, a documentary on arts censorship, or a traditional Japanese fertility festival featuring a procession of markers with images of human genitalia (JA 224-25) would surely court suppression by operators under such a standard, regardless of whether, at the end of years of litigation (assuming that DAETC had the resources to pursue it), an operator's belief that programming was "indecent" was found unreasonable.[39]

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[39] Moreover, once censorship occurs, few programmers will be able to (continued...)

There are still other aspects in which the cable "indecency" standard is patently vague. First, and crucially important from the standpoint of vagueness, the "reasonable belief" standard in § 10(a) substantially exacerbates the statute's imprecision and potential for discriminatory enforcement. Unlike the Commission's broadcast indecency standard, which is at least applied by one agency,[40] § 10(a)'s invitation is to censor not only the "indecent" (as it might be measured judicially) but also what an operator "reasonably believes" is indecent: a far bigger kettle of fish. Imprecision and self-censorship are therefore multiplied. *See* Schwartz Decl., JA 390, 392-94. Doubly subjective judgments are particularly indeterminate.[41] *Big Mama Rag*, 631 F.2d at 1037-38; *Stanton v. Brunswick Sch. Dep't*, 577 F. Supp. 1560, 1574 (D. Me. 1984). Thus, this Court in *Interstate Circuit*, striking down as vague a movie classification ordinance, pointed particularly to the ordinance's relegation of decision-making to "the judgment of the [classification] Board." 390 U.S. at 681. Likewise, in *Bella Lewitzky*, 754 F. Supp. at 781-82, the court invalidated as vague the NEA's obscenity oath because it relied on the agency's unreviewable "judgment" as to what is obscene.

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[39](...continued)
afford lengthy proceedings seeking redress, especially when delays to decision are inevitable given the various defenses for operators to assert, including "reasonable belief," which would likely forestall courts from reaching the substantive merits altogether, and the contention that no cause of action is available under the Communications Act.

[40] As noted below at II.B, this Court has never upheld the broadcast standard against a constitutional vagueness challenge, and one lower court that did so explicitly welcomed "correction from Higher Authority," *Action for Children's Television v. FCC*, 852 F.2d 1332, 1339 (D.C. Cir. 1988).

[41] The gap between the two standards is comparable to the gap between "real probable cause" and the easier-to-make-out standard of "good-faith belief" reflected in *United States v. Leon*, 468 U.S. 897 (1984), or between actual constitutional violations and "good-faith" qualified immunity under 42 U.S.C. § 1983.

The cable "indecency" standard is "based on the 'average cable subscriber' . . . not confined to a specific geographical area or specific cable system." First Report, Pet. 148a-49a. This Court has recognized, however, that "our Nation is simply too big and too diverse for this Court to reasonably expect that such standards [as 'patently offensive'] could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists." *Miller v. California*, 413 U.S. at 30.[42] Both cable operators and programmers are left wholly without guidance as to who such an "average cable subscriber" is and how the standard relates to current cable programming in Los Angeles, Kalamazoo, New York, or Salt Lake City.

Finally, the dangers of arbitrary action, and indeed self-censorship, are magnified because under § 10 operators need not prohibit or block comparably "indecent" programs on their own channels, and, thus, access programmers cannot gain any useful guidance or comfort from comparing their own programming to other programs carried on the system.[43] The presence of any comparable or even more sexually explicit program is absolutely no assurance that a cable operator or the Commission would not find an access program to be "indecent."[44]

B. *Pacifica* Is Not Controlling.

1. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), does not foreclose petitioners' vagueness challenge to § 10's definition of "indecency." Its "emphatically narrow" holding addressed only the facts of that particular adjudication (the monologue "as broadcast"), stressed that the seven words at issue were at the very core of the

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[42] *See also Sable Communications of Calif., Inc. v. FCC*, 492 U.S. 115, 125 (1989); *Smith v. Goguen*, 415 U.S. at 574 (because of "widely varying attitudes and tastes," a ban on "contemptuous" treatment of the flag provided no meaningful guide to conduct or enforcement).

[43] Indeed, cable operators may even ban some "indecent" programs on access channels and only block the others. First Report, Pet. 151 n.39.

[44] *See* Schwartz Decl., JA 393 (noting that "REAL SEX" on HBO and THE PLAYBOY CHANNEL are carried on many systems).

statutory proscription, and expressly disclaimed any opinion on the facial validity of the "indecency" standard of 18 U.S.C. § 1464.[45] The Court noted that no sanctions had been imposed or would be "without warning." *id.* at 743. The Court narrowed its decision even further by expressly limiting its fact-specific ruling to the broadcast medium and to a nuisance (channelling) rationale. *Id.* at 750; *see Sable*, 492 U.S. at 127-28 (*Pacifica* was "an emphatically narrow holding"); *Bolger*, 463 U.S. at 74.[46]

Pacifica did not purport to overrule the vagueness cases cited above at 25-26. It did not consider a "reasonably believes" standard heaped onto an "indecency" standard or the authorization of a total ban. Nor did it consider "indecency" under the shadow of the Commission's since-greatly expanded sense of what falls within that rubric: not just dirty words, but, as the record shows here, speech of serious value, whose

> very merit will [often] be inseparable from its seminal "offensiveness." A bowdlerized documentary on the Mapplethorpe exhibit which did not include some description or depiction of Mapplethorpe's sexually explicit photographs themselves, for example, would hardly be an informative statement on the artistic and political debate the exhibit

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[45] This Court observed that the Commission had not engaged in rule making and that its review was "limited to the question whether the Commission has the authority to proscribe this particular broadcast." 438 U.S. at 742; *see id.* at 734. The Court further stressed that "the time of day" in which an indecency standard applied was "all-important" and cautioned that it was not passing on the facial validity of "indecency," much less approving it as a permissible standard for prohibition as opposed to channelling. *Id.* at 750.

[46] Indeed, Pacifica did not contest that the Carlin monologue fit the Commission's definition. 438 U.S. at 739. Commentators, including the author of the *Pacifica* plurality opinion, have since suggested that the station would probably have won its case had it challenged the Commission's sanction on the specific facts presented. *E.g.*, Hon. John Paul Stevens, *The Freedom of Speech*, 102 YALE L.J. 1293, 1307 (1993); Daniel Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727, 757 (1980).

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Pet. 45a (Wald, J., dissenting).[47] By contrast, Justice Stevens' plurality opinion in *Pacifica* reveals time and again that it was considering "indecent *language*"; not, as § 10 and its regulations do, "indecent programming."[48]

In short, *Pacifica* simply did not decide whether "indecency" as defined here by Congress and the Commission is sufficiently definite for a scheme of delegated censorship under a "reasonable belief" standard that escapes judicial and even administrative superintendence.

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[47] Documenting the Commission's dramatic expansion of "indecency," see Public Notice, 2 FCC Rcd 2726 (1987); *Infinity Broadcasting*, 3 FCC Rcd 930 (1987); *KSD-FM*, Notice of Apparent Liability, 6 FCC Rcd 3689 (1990) (newsworthy nature of broadcast would be a factor but would not be dispositive in "indecency" determination); *Pacifica Found.*, 2 FCC Rcd 2698 (play dealing with AIDS and homosexuality), *recon. & clarif. granted in part*, 3 FCC Rcd 930 (1987); *Action for Children's Television*, 852 F.2d at 1336; John Crigler & William J. Byrnes, *Decency Redux: The Curious History of the New FCC Broadcast Indecency Policy*, 38 CATH. U. L. REV. 329, 338-41 (1989) (describing indecision over broadcast of ULYSSES); Richard G. Passler, *Regulation of Indecent Radio Broadcasts: George Carlin Revisited — What Does the Future Hold for the Seven "Dirty" Words?*, 65 TUL. L. REV. 131, 140 (1990) (noting the Commission's "new, more generic standard expanded the definition of indecent language beyond anything the Court in *Pacifica I* ever envisioned"); Steven Nudelman, *A Chilly Wait in Radioland: The FCC Forces "Indecent" Radio Broadcasters to Censor Themselves or Face the Music*, 2 J.L. & POL. 115 (1994).

[48] Thus, faced with a statute that on its face reached only "obscene, indecent, or profane *language*," 18 U.S.C. § 1464 (emphasis added), and with the Carlin monologue, the Court wrote that there are "few, if any, thoughts that cannot be expressed by the use of less offensive language." 438 U.S. at 743 n.18. But the Commission's focus has moved well beyond "dirty words," and its regulation of "indecent programming" sets at risk a host of valuable programs on such subjects as artists, reproductive health, breast or testicular cancer, and anthropology, which would be entirely unviable, or rendered far less effective, if stripped of all depiction or description of "sexual or excretory activities or organs."

2. If *Pacifica* were found to have decided the vagueness question, it should be reconsidered and overruled. Whatever national consensus might have permitted anyone to find seven dirty words patently offensive as broadcast in the mid-afternoon 20 years ago cannot render the Commission's § 10 indecency standard sufficiently precise for now and beyond. Times and mores have changed. Ask any ten Americans from different communities what is patently offensive to the average cable subscriber, and you will have ten answers. Those in their 20's would give vastly different answers than their grandparents.

Sexual politics, *i.e.*, discussions of relationships between and among the sexes, have become a major issue for public debate. Public proceedings concerning sexual harassment and "date rape" are broadcast or cablecast on television. Depiction of "sexual organs" are commonplace, not only in "adult" materials, but in mainstream magazines, advertisements, and motion pictures. *The Simpsons*, enjoyed by millions of children and adults on broadcast TV, recently (December 3) showed each family member in the buff and Bart engaging in an "excretory activity." In the film *ET*, which millions of young children watch on video cassette in the home, one child calls another "penis-breath." The speech of artists and journalists, and of many from all walks of life whose voices are not otherwise heard on broadcast and most cable systems, also frequently embraces such politically sexual issues as rape and domestic violence, safe sex, and, indeed, the nature of sexuality itself. *See* David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111, 125 (1994).

The rationales underlying the plurality opinion in *Pacifica* have substantially weakened since 1978. The current viability of the "pig in the parlor" rationale is questionable in light of the availability of lockboxes and other parental control mechanisms. Moreover, in contrast to the plurality's relegation of "indecent" language to diminished constitutional status, the Court's subsequent majority

decision in *Sable* establishes that indecent but not obscene expression has full First Amendment protection.[49]

Petitioners see no occasion here for reconsidering *Pacifica*, but if the Court concludes that that case controls this vagueness challenge, then *Pacifica* should be limited to its facts or overruled.

C. Section 10 Lacks Essential Procedural Safeguards.

The immediate, intended, and direct impact of a cable operator's exercise of the censorship power created by § 10 is to restrain protected speech permanently and in advance of its communication. In §§ 10(a) and 10(c), Congress authorized cable operators to censor outright protected speech: not only speech that is asserted (but has never been judicially found) to be "indecent," but also the substantially broader category of speech that the operator "reasonably believes" to be indecent. Congress and the Commission did precisely what this Court has repeatedly condemned: they gave censors "wide discretion" to restrain speech depending on their predilections.[50]

Thus, "[c]able operators may, if they choose, pre-screen programming as a means to enforce any cable operator policies adopted under the authority of section 10(a)." Second Report, Pet. 151a n.39. This is the classic form of prior restraint, under a long line

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[49] In addition, as Justice Stewart and three other dissenters in *Pacifica* persuasively argued, the term "indecent" in 18 U.S.C. § 1464 is most reasonably read to be simply a synonym for "obscene," particularly in view of the constitutional difficulties created by a more expansive definition. 438 U.S. at 777-80; *see* 47 U.S.C. § 532(h) (referring to cable service that is "obscene, or . . . indecent *or is otherwise unprotected by the Constitution*") (emphasis added).

[50] *E.g.*, First Report, Pet. 143a ("Congress intended to provide cable operators wide discretion"); *id.*, Pet. 144a-45a ("Given the wide discretion Congress afforded . . . , we see no reason to dispute" that "cable operators have the discretion to prohibit some, but not necessarily all, indecent programming"); Second Report, Pet. 189a ("section 10(c) was intended to afford cable operators broad discretion [under] section 10(c)," including banning of "indecent" programs on some but not all access channels).

of cases condemning the power to pre-screen and prohibit absent specific procedures, which are entirely unavailable here.[51]

Less bluntly but just as surely, § 10(b), too, interdicts speech that willing viewers would otherwise access. To the extent that cable operators do not prohibit all indecent speech on leased access channels, they must withhold it from every subscriber unless the subscriber requests the speech, and even then for an additional thirty days. 47 C.F.R. § 76.701(d), Pet. 171a.

Because this system of content-based prohibitions, restraints, and delays is "indistinguishable in its censoring effect from the official actions consistently identified as prior restraints in a long line of this Court's decisions," it "'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.'" *Southeastern Promotions*, 420 U.S. at 552, 559 (quoting *Freedman v. Maryland*, 380 U.S. at 58).

> *First*, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second*, any restraint prior to judicial review can be imposed only for a specialized brief period and only for the purpose of preserving the status quo. *Third*, a prompt final judicial determination must be assured.

Id. at 560 (discussing *Freedman v. Maryland*, 380 U.S. 51).[52]

Section 10's censorship scheme lacks each of those requirements.[53] The censor bears no burden of promptly instituting

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[51] *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990); *Riley v. National Fed'n of Blind of N.C., Inc.*, 487 U.S. 781 (1988); *Freedman v. Maryland*, 380 U.S. 51, 58 (1965).

[52] *See also FW/PBS*, 493 U.S. at 229 (all three *Freedman* factors are applicable where, as here, a "censor [is] engaged in direct censorship of particular expressive material"); *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 367 (1971); *Blount v. Rizzi*, 400 U.S. 410, 419-21 (1971); *Teitel Film Corp. v. Cusack*, 390 U.S. 139 (1968).

[53] The Commission found procedural safeguards unnecessary on the

(continued...)

judicial (or any other) proceedings. Under § 10, a cable operator, having pre-screened or obtained information about a program, simply censors it, thereby suppressing it to all viewers, or blocks it, thereby suppressing it to all blocked viewers unless they learn of the program and request it at least thirty days in advance. The viewer or programmer, not the operator, must "assume the burden of instituting judicial proceedings and of persuading the courts that the [program] is protected expression," *Freedman v. Maryland*, 380 U.S. at 59-60, assuming *arguendo* that there is a cause of action to challenge particular acts of censorship. The operator's censorship is thus final, not provisional or brief, expressly so under §§ 10(a) and 10(c) and as a practical matter under § 10(b). Given the absence of any provision for "judicial superintendence" at all,[54] there is naturally no provision for prompt judicial review to restore free speech rights when they have been "erroneously denied."

In sum, § 10 is unconstitutional because it provides for censorship without required procedural protections.

III.

SECTION 10'S CONTENT-BASED DIRECT BURDENS ON FREE SPEECH RIGHTS VIOLATE THE FIRST AMENDMENT.

1. Section 10 "amounts to raw censorship based on content, censorship forbidden by the text of the First Amendment and well-settled principles protecting speech and the press. That ought to

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[53](...continued)
theory that any censorship under §§ 10(a) and (c) would be private action, even though the government defines the speech to be censored and prescribes regulations (§ 10(c)) or written policy requirements (§ 10(a)) under which the censorship takes place. *See* Second Report, Pet. 193a n.17. Delegation of censorship to private decision-makers is of course no answer to the insurmountable due process problems that result. *See National Ass'n of Theatre Owners, Inc. v. Motion Picture Comm'n*, 328 F. Supp. 6 (E.D. Wis. 1971); *Engdahl v. City of Kenosha*, 317 F. Supp. 1133 (E.D. Wis. 1970); *Motion Picture Ass'n of Am. v. Specter*, 315 F. Supp. 824 (E.D. Pa. 1970).

[54] *See Interstate Circuit*, 390 U.S. at 686 (citing cases).

end the matter." *Simon & Schuster*, 502 U.S. at 128 (Kennedy, J., concurring). As Justice Kennedy pointed out, the strict scrutiny test was imported from equal protection jurisprudence and "has no real or legitimate place when the Court considers the straightforward question whether the State may enact a burdensome restriction of speech based on content only." *Id.* at 124. Because § 10 authorizes the prohibition of speech based solely on its content, it should be invalidated without further inquiry into whether this plain First Amendment violation also narrowly advances compelling government interests. *Id.* at 124-128.

2. Even assuming *arguendo* that a content-based authorization to prohibit a huge amount of protected speech (when engaged in only by certain speakers) is not invalid per se, § 10 cannot survive the "the most exacting scrutiny" to which it is, at a minimum, subject. *Turner*, 114 S. Ct. at 2459.[55] Under strict scrutiny the government must prove (not merely assert) that the regulations are necessary and narrowly tailored to achieve compelling governmental interests that cannot be otherwise achieved. *Id.* at 2469 (requiring such proof even under intermediate review); *see, e.g., Sable*, 492 U.S. at 126; *Simon & Schuster*, 502 U.S. at 118.

A challenged regulation is not "narrowly tailored" if it is significantly overinclusive, burdening speech that need not be burdened to achieve the government's compelling interest. *See id.*

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[55] *See* above at 14. Neither the Commission nor the court of appeals doubted that § 10 is subject to strict scrutiny to whatever extent it is subject to constitutional review at all. *See* Pet. 32a-34a; Pet. 131a-40a. Until this case, the courts had unanimously held that restrictions on "indecent" cable programming violate the First Amendment *E.g., Wilkinson v. Jones*, 480 U.S. 926 (1987) (mem.), *aff'g* 800 F.2d 989 (10th Cir. 1986), *aff'g* 611 F. Supp. 1099 (D. Utah 1985). *See also Goldstein v. Manhattan Cable Television Inc.*, No. 90 Civ. 4750, 1995 WL 562182 (S.D.N.Y. Sept. 20, 1995); *Altmann v. Television Signal Corp.*, 849 F. Supp. 1335 (N.D. Cal. 1994); *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985); *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982); *Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982).

at 121-22 (invalidating New York's Son-of-Sam law because it burdened "a wide range of literature" whose burdening could not be defended by the asserted justification); *see also NTEU*, 115 S. Ct. at 1012-15 (well-intended but overbroad honoraria ban would have prohibited payment for works by Hawthorne, Melville, Whitman, and Harte); *Texas v. Johnson*, 491 U.S. at 407-10 (statute reached far more speech than necessary to advance interest in preserving order).

A challenged law will also fail strict scrutiny if it is significantly underinclusive, failing to reach other conduct and speech that poses the same harm. *Florida Star v. BJF*, 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring in part and in judgment) ("a law cannot be regarded as protecting an interest 'of the highest order,' and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited") (citation omitted); *see also Simon & Schuster*, 502 U.S. at 123 (Blackmun, J., concurring); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987); *Carey v. Brown*, 447 U.S. 455, 465 & n.9 (1980). Thus, the government must prove the necessity not only for § 10 as a whole, but also for the content- and speaker-based distinctions embodied in § 10: here, that it is necessary to restrict only the "indecent" speech of access programmers. *Minneapolis Star*, 460 U.S. 575; *Leathers v. Medlock*, 499 U.S. at 447.

The government has an interest in enabling parents to protect their children from harm and, one may assume, in directly protecting children from harm in circumstances where parental supervision is likely to be systematically or structurally impracticable.[56] Even

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[56] The many cases recognizing a strong interest in enabling parents to control their upbringing of their children are inconsistent with an independent governmental interest in protecting children from non-obscene speech contrary to parental wishes, as Chief Judge Edwards observed, Pet. 77a. *See, e.g., Bolger*, 463 U.S. at 73, 75 (right of parent to provide children with materials government deems harmful); *Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) ("the prohibition against sales to minors does not bar parents who

(continued...)

so, however, § 10 is far from the least restrictive means available to achieve it.

A. Sections 10(a) and 10(c) Are Not Narrowly Tailored.

The government's concession that §§ 10(a) and 10(c) are invalid if they are subject to constitutional review is dispositive and, in view of *Sable*, inevitable. It is apparent from examining the "likely" and "practical" effect that § 10 will have, as is required (*see* above at 16), that it will suppress a wide range of protected and valuable speech from a vital avenue of communication, cable television. Speech that would otherwise be communicated and eagerly received will be prohibited across the board, rendered unavailable not only to young children, but also to older teenagers and adults. "'Surely this is to burn the house to roast the pig.'" *Sable*, 492 U.S. at 127 (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)); *see also Sable*, at 127 ("*Pacifica* is readily distinguishable from this case, most obviously because it did not involve a total ban on broadcasting indecent material"); *Pacifica*, 438 U.S. at 750 & n.28 (implying that prohibition of broadcasting indecent language would violate the First Amendment).

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[56](...continued)
so desire from purchasing the magazines for their children"); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (striking law as interfering with "the power of parents to control the education of their own"); *see also Pacifica*, 438 U.S. at 769-70 (Brennan, Marshall, JJ., dissenting); Pet. 59a-61a (Wald, J., dissenting).

Assuming, however, that the government has an independent interest in protecting children from non-obscene speech in those circumstances where parental control is likely to be structurally impracticable, cable television is decidedly not a context where such circumstances exist, and hence that additional interest cannot support restrictions on speech in this case beyond those supportable under the interest in enabling parents. Cable television is exclusively accessible in homes (there are no pay-cable sets on street corners), where it is an invited (and paid-for) guest. In sharp contrast to telephones, cable television is highly susceptible to parental control, as the family mailbox was found to be in *Bolger*, 463 U.S. at 73.

B. Section 10(b) Is Not Narrowly Tailored.

Assuming that §§ 10(a) and 10(c) are invalid and severable, the remaining portion of the regulatory framework — requiring the blocking of unprohibited "indecent" speech from only leased access channels, but not PEG channels or any other channels — also imposes burdens on speech that are neither necessary nor narrowly tailored to advance the government's goals.

1. Section 10(b) is impermissibly overinclusive, because its restrictions on speech do not advance the government's goals.

Section 10(b)'s blocking scheme is invalid for the same reason that the Son-of-Sam law was struck down: however laudable the goal to be served, the regulatory scheme is so carelessly constructed (and in such derogation of basic First Amendment principles) that it burdens substantial and valuable speech that need not be burdened to achieve its legitimate goals, and in any event imposes far greater burdens on speech than are necessary given available alternatives that are far less oppressive.

As in *Simon & Schuster*, 502 U.S. at 122, and *NTEU*, 115 S. Ct. at 1013, a substantial portion of the burden on speech does not serve to advance the government's content-neutral goal. *See* above at 7 & n.6. Instead of targeting speech that would be *harmful* to children, as in *Ginsberg v. New York*, 390 U.S. at 639, § 10's touchstone is any reference to sexual activity or body parts that operators might believe the "average cable subscriber" would consider "offensive," even if those materials undeniably have serious literary, artistic, scientific, or educational value. Offensiveness is surely not a proxy for harm. *See* above at 29. Regardless of whether the hypothetical "average cable subscriber" might consider Picasso's drawings, Shakespeare's double entendres, film of a Japanese village fertility festival, or an illustrated discussion of the importance of and techniques for breast self-examination to be offensive, such content is not harmful to all those under 18 (indeed, it is probably not harmful to any of them).

2. Section 10(b) imposes unnecessary burdens on speech.

Petitioners begin by identifying the burdens imposed by § 10(b), even in the absence of §§ 10(a) and 10(c), and then turn to the available alternatives that advance the relevant interests equally as well with far less restriction on First Amendment interests.

Section 10(b) requires suppression of speech unless viewers perform "an official act" as a prerequisite to receiving constitutionally protected programming. But, as this Court held in *Lamont v. Postmaster General*, 381 U.S. 301, 305 (1965), requiring "an official act (viz., returning the reply card) as a limitation on the unfettered exercise of the addressee's First Amendment rights" is unconstitutional. Requiring a written request — thereby placing one's name on a list of those desiring "bad" speech and exposing oneself to subpoena, leak, or gossip — is "an affirmative obligation which we do not think the Government may impose . . . [and] is almost certain to have a deterrent effect." *Id.* at 307; *see also Fabulous Assocs., Inc. v. Pennsylvania Pub. Util. Comm'n*, 896 F.2d 780, 785 (3d Cir. 1990) ("An identification requirement exerts an inhibitory effect, and such deterrence raises First Amendment issues comparable to those raised by direct state imposed burdens or restrictions") (citing *Talley v. California*, 362 U.S. 60, 64-65 (1960)).[57]

Blocking under 10(b) is indistinguishable from a total prohibition for viewers who, not yet having requested access, would have seen a (now-blocked) program while changing channels and decided to watch it. The same is true for every subscriber who promptly asks for access to a program she learns about — from a friend who calls and says "turn to channel 36," from a listing in a daily newspaper or weekly TV Guide, or from a community group telephone call or mailing — but will be denied because of the 30-day delay in unblocking. Advisories about such programs (which could prompt an unblocking request) are rarely available with more than 7 days notice, and virtually never with more than 30.

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[57] *See McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511, 1516-17 (1994) (recognizing First Amendment and privacy interests served by anonymity).

Yet, in a sterile analysis at odds with this Court's First Amendment jurisprudence and *Lamont*, the court of appeals held that the practical loss of speech was of no constitutional concern, because speakers are not forbidden "from speaking" and viewers could have obtained all indecent speech had they previously sent in their postcards asking to be put on the "indecent speech" list. *Compare* Pet. 42a *with*, *e.g.*, *Lamont*, 381 U.S. at 306-07. Judge Wald's response is compelling.[58]

The blocking scheme is "almost certain to have a deterrent effect" on those who would otherwise seek to obtain the speech by requiring virtually any speech with a sexual reference to be "certified" with the denigrating term "indecent," authorizing operators to divert speech they "believe" to be "indecent" onto a channel for "indecent" speech, and prohibiting access except upon

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[58] [Many viewers] probably do not want to be perceived (even by their cable operator, much less anyone who might later acquire such information by subpoena or otherwise) as the kind of people who [want indecent speech]. They therefore will not affirmatively write for access . . . . Yet given a free choice in the matter, they might prefer to have unimpeded, selective access to some but not all programs that fall within that broad umbrella designation. Not only *aficionados* of the arts or of politics but also the mildly curious might well decide to watch an "unvarnished" documentary on the Mapplethorpe exhibit if it is readily available, for example, but may not write to request an entire channel of indecency on the chance that this and similar programs will be included. They may want to shield their children from most "indecent" programming, yet may occasionally find it appropriate to expose older children to frank, even graphic discussions of sexuality and the AIDS epidemic, including some programs that might fall within the FCC's definition of "indecency" (or at any rate are close enough to the line that cable operators will ban them altogether or relegate them to the "indecent" channel). Whether they are "channel surfers" who like to browse before settling on a program, or "appointment viewers" who prefer to study a program guide and watch preselected programs, this regulation [deprives viewers of speech that they would otherwise obtain].

Pet. 57a (Wald, J., dissenting).

a written request for the "indecent" channel.[59] *Lamont*, 381 U.S. at 307; *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 766-67 (1986).

The government entirely failed to show that *any* of these burdens was necessary, and the record and reason demonstrate that there are a number of available, less restrictive alternatives — including lockboxes already required by law, or the even less restrictive and equally effective blocking-on-request — by which the government could advance its legitimate interests.

Since 1984, Congress has mandated that cable operators provide a "lockbox" to every subscriber, 47 U.S.C. § 544(d)(2), having found during lengthy committee hearings and floor discussions that lockboxes are a very effective and efficient means of individually regulating what is viewable in one's own home, *e.g.*, H.R. REP. NO. 934, 98th Cong., 2d Sess. 70 (1984).[60] There is no demonstration in § 10's legislative history — indeed, there are no congressional findings as to § 10 at all — that lockboxes are no longer a sufficient means of meeting any asserted compelling governmental interest underlying § 10 or otherwise. Before the Commission, operators, programmers, and viewers noted without contradiction that lockboxes are an effective way of achieving the government's aims. *See* above at 7-8.

The court of appeals' contrary conclusion (Pet. 33a-36a) lacks any foundation in the record (or in anything before Congress) and applies a version of strict scrutiny so relaxed that it bears no semblance to the test that this Court deploys. *Compare Sable*, 492 U.S. at 128-129, and *id.* at 131 (Scalia, J., concurring) (available technological alternatives render statute invalid, even though some

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[59] The privacy provisions of 47 U.S.C. § 551 do not resolve these concerns, for they are entirely dependent upon cable operators and the penalties for violation thereof are minimal.

[60] Lockboxes allow a subscriber to block and unblock any channel at any time, generally by programming her lockbox and using a numerical code or mechanical lock that the subscriber controls. Pet. 36a; *see also* Lockbox Manuals, JA 95-100, 126-30, 147-51.

children "would manage to secure access") *with* Pet. 35a (lockbox alternative not effective because adults would have to "continually activate and deactivate their lockboxes, inevitably risking a slip up or a lapse"); *see also NTEU*, 115 S. Ct. at 1017 (individual determinations less restrictive than wholesale prophylactic rule).

Another obvious alternative that puts decision-making in the hands of parents instead of the state is reverse central blocking, under which an operator would block specific channels on a subscriber's request to do so. Blocking on subscriber *request* would be equally effective at facilitating parental protection of children and, with respect to each of the burdens imposed by § 10(b), far less restrictive than the present system. Notably, the telecommunications restructuring bill passed in the Senate and, at this writing, in conference recognizes the practicability of such a system, and would require scrambling "upon subscriber request."[61]

Further, there is no merit to the government's attempt to cure the absence of findings by the Commission or Congress regarding the necessity for § 10(b)'s blocking scheme by focussing on findings regarding a completely different medium, telephones.[62] This Court has repeatedly insisted that each medium of communication requires individual treatment, *e.g.*, *Pacifica*, 438 U.S. at 748, *Burstyn*, 343 U.S. at 503, and findings from one medium cannot simply be imported to another where the basic structures differ in important relevant respects. Here, it is self-evident that the telephone has highly relevant technological capabilities (and limitations) and practical configurations wholly different from cable. *See* Regulations Concerning Indecent Communications by Telephone, 5 FCC Rcd 4926 (1990).

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[61] S. 652, 104th Cong., 1st Sess. § 407 (1995); *see also* S. Con. 652, 104th Cong., 1st Sess. § 504 (draft of Dec. 17, 1995, 5:33 p.m.).

[62] In its opposition to the petitions for certiorari at 18, the government asserted that § 10(b) is "based on similar blocking requirements used to control children's access to dial-a-porn" and that "Congress *could* reasonably draw upon the knowledge gained in constructing that analogous legislation" (emphasis added).

For example, it is not technologically practical to use voluntary blocking for telephones because of the extremely large number of dial-a-porn numbers and the ease of creating or switching to new numbers. By contrast, lockboxes present a practical means of voluntary blocking on cable, because televisions are not available on street corners and cable operators only rarely reallocate channel numbers. *Cf. Bolger*, 463 U.S. at 73 ("We can reasonably assume that parents already exercise substantial control over the disposition of mail once it enters their mailboxes").

The government has not cited any evidence or congressional findings as to the necessity for automatic central blocking limited to leased access, such as it presented to the courts in the "dial-a-porn" cases, nor any findings that the situations are analogous. And the evidence is to the contrary. For these reasons — and because § 10 will effectively prohibit and deny adults and minors access to valuable speech that they would have otherwise accessed and have a right to receive, *id.*, whereas the effect of the dial-a-porn measures was entirely less restrictive for adults — the cases upholding the final version of the dial-a-porn regulations are inapposite here.

3. Section 10(b) is impermissibly underinclusive, because it blocks only speech by leased access programmers.

Finally, § 10(b) and its implementing regulations require the blocking of "indecent" speech on leased access channels, but not on PEG channels and not on the channels over which a cable operator has editorial discretion. Irrationally, even though a cable operator is *required* to block on a leased access channel a program that is identified as (or which it believes to be) "indecent," the operator is entirely free to cablecast that same program (or any other program with comparably "indecent" content) on any other cable channel. *See* above at 32 n.44. Of course, given the strong antipathy that many cable operators have for access programmers and their desire to exclude them from their systems,[63] the likelihood that blocking

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[63] *See, e.g.*, S. REP. NO. 92, 102d Cong., 1st Sess. 31 (1991) ("The cable operator is almost certain to have interests that clash with that of the

(continued...)

will be used to disadvantage leased access programmers, rather than to protect children, is substantial.

"One step at a time" is not a justification for content- or speaker-based distinctions where First Amendment rights are concerned, regardless of the en banc court's unsupported assertion to the contrary, Pet. 39a-40a. *See Minneapolis Star*, 460 U.S. at 585; *Arkansas Writers' Project*, 481 U.S. at 231-32. But even if it were, no factual predicate for such a justification has been demonstrated here, and none exists. Speech apparently within the "indecent" definition can be, and indeed is, cablecast across every portion of cable systems without legal restraint (and can be broadcast, as well, during the safe harbor hours).[64] Absent any demonstrated compelling necessity for blocking only access channels, § 10(b) violates the First Amendment.

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[63](...continued)
programmer seeking to use leased access channels . . . . For example, the operator may believe that the programmer might compete with programming that the [operator] owns or controls"); H.R. REP. NO. 934, 98th Cong., 2d Sess. 48 (1984) (access channels may "represent[] a social or political viewpoint that a cable operator does not wish to disseminate" and may "compete[] with a program service already being provided by that cable system"); *see also* Comments of DAETC, JA 202; NYNEX Tel. Cos., JA 377.

[64] *See Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir.), *pet. for cert. filed*, 64 U.S.L.W. 3271 (Sept. 26, 1995); New York Citizens Comm. for Responsible Media, JA 365-74; Schwartz Decl., JA 393.

CONCLUSION

For all the foregoing reasons, section 10 and its implementing regulations are unconstitutional and the judgment below should be reversed.

Respectfully submitted,

STEVEN R. SHAPIRO
MARJORIE HEINS
American Civil Liberties
Union Foundation
132 West 43d Street
New York, New York 10036
(212) 944-9800

CHARLES S. SIMS
Counsel of Record
PETER J.W. SHERWIN
Proskauer Rose Goetz
& Mendelsohn LLP
1585 Broadway
New York, New York 10036
(212) 969-3000

Counsel for Petitioners

New York, New York
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STATUTORY APPENDIX

47 U.S.C. § 531
Cable channels for public, educational, or governmental use

(a) Authority to establish requirements with respect to designation or use of channel capacity

A franchising authority may establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use only to the extent provided in this section.

(b) Authority to require designation for public, educational, or governmental use

A franchising authority may in its request for proposals require as part of a franchise, and may require as part of a cable operator's proposal for a franchise renewal, subject to section 546 of this title, that channel capacity be designated for public, educational, or governmental use, and channel capacity or institutional networks be designated for educational or governmental use, and may require rules and procedures for the use of the channel capacity designated pursuant to this section.

* * *

(e) Editorial control by cable operator

Subject to section 544(d) of this title, a cable operator shall not exercise any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this section.

* * *

Section 10(c) of the Cable Television Consumer Protection and Competition Act of 1992
Pub. L. No. 102-385, § 10(c), 106 Stat. 1486

Within 180 days following the date of the enactment of this Act [Oct. 5, 1992], the Federal Communications Commission shall promulgate such regulations as may be necessary to enable a cable operator of a cable system to prohibit the use, on such system, of any channel capacity of any public, educational, or governmental access facility for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct.[1]

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[1] In this appendix, italics indicate provisions added by Section 10.

47 U.S.C. § 532
Cable channels for commercial use

(a) Purpose

The purpose of this section is to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems.

(b) Designation of channel capacity for commercial use

(1) A cable operator shall designate channel capacity for commercial use by persons unaffiliated with the operator in accordance with the following requirements:

(A) An operator of any cable system with 36 or more (but not more than 54) activated channels shall designate 10 percent of such channels which are not otherwise required for use (or the use of which is not prohibited) by Federal law or regulation.

(B) An operator of any cable system with 55 or more (but not more than 100) activated channels shall designate 15 percent of such channels which are not otherwise required for use (or the use of which is not prohibited) by Federal law or regulation.

(C) An operator of any cable system with more than 100 activated channels shall designate 15 percent of all such channels.

(D) An operator of any cable system with fewer than 36 activated channels shall not be required to designate channel capacity for commercial use by persons unaffiliated with the operator, unless the cable system is required to provide such channel capacity under the terms of a franchise in effect on October 30, 1984.

(E) An operator of any cable system in operation on October 30, 1984, shall not be required to remove any service actually being provided on July 1, 1984, in order to comply with this section, but shall make channel capacity

available for commercial use as such capacity becomes available until such time as the cable operator is in full compliance with this section.

* * *

(5) For the purposes of this section, the term "commercial use" means the provision of video programming, whether or not for profit.

(6) Any channel capacity which has been designated for public, educational, or governmental use may not be considered as designated under this section for commercial use for purpose of this section.

(c) Use of channel capacity by unaffiliated persons; editorial control; restriction on service; rules on rates, terms, and conditions

(1) If a person unaffiliated with the cable operator seeks to use channel capacity designated pursuant to subsection (b) of this section for commercial use, the cable operator shall establish, consistent with the purpose of this section and with rules prescribed by the Commission under paragraph (4), the price, terms, and conditions of such use which are at least sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system.

(2) A cable operator shall not exercise any editorial control over any video programming provided pursuant to this section, or in any other way consider the content of such programming, except that an operator may consider such content to the minimum extent necessary to establish a reasonable price for the commercial use of designated channel capacity by an unaffiliated person.

* * *

(h) Cable service unprotected by Constitution

Any cable service offered pursuant to this section shall not be provided, or shall be provided subject to conditions, if such cable service in the judgment of the franchising authority *or the cable operator* is obscene, or is in conflict with community standards in that it is lewd, lascivious, filthy, or indecent or is otherwise

unprotected by the Constitution of the United States. *This subsection shall permit a cable operator to enforce prospectively a written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards.*

* * *

(j) Single channel access to indecent programming

(1) Within 120 days following October 5, 1992, the Commission shall promulgate regulations designed to limit the access of children to indecent programming, as defined by Commission regulations, and which cable operators have not voluntarily prohibited under subsection (h) by —

(A) requiring cable operators to place on a single channel all indecent programs, as identified by program providers, intended for carriage on channels designated for commercial use under this section;

(B) requiring cable operators to block such single channel unless the subscriber requests access to such channel in writing; and

(C) requiring programmers to inform cable operators if the program would be indecent as defined by Commission regulations.

(2) Cable operators shall comply with the regulations promulgated pursuant to paragraph (1).

47 U.S.C. § 544
Regulation of services, facilities, and equipment

* * *

(d) Cable service unprotected by Constitution; blockage of premium channel upon request

(1) Nothing in this subchapter shall be construed as prohibiting a franchising authority and a cable operator from specifying, in a franchise or renewal thereof, that certain cable services shall not be provided or shall be provided subject to conditions, if such cable services are obscene or are otherwise unprotected by the Constitution of the United States.

(2) In order to restrict the viewing of programming which is obscene or indecent, upon the request of a subscriber, a cable operator shall provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber.

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47 U.S.C. § 558

Criminal and civil liability

Nothing in this subchapter shall be deemed to affect the criminal or civil liability of cable programmers or cable operators pursuant to the Federal, State, or local law of libel, slander, obscenity, incitement, invasions of privacy, false or misleading advertising, or other similar laws, except that cable operators shall not incur any such liability for any program carried on any channel designated for public, educational, governmental use or on any other channel obtained under section 532 of this title or under similar arrangements *unless the program involves obscene material*.